BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaint by James Moffatt dated November 26, 1991, alleging discrimination in employment on the basis of handicap and sexual orientation.

B E T W E E N :

Ontario Human Rights Commission

- and -

James Moffatt

Complainant

- and -

Harry Oswin
Kinark Child & Family Services

Respondents

INTERIM DECISION

Adjudicator : Mary Anne McKellar

Date : December 6, 1995

Board File No: BI-0056-95

Decision No : 95-0051-I

Board of Inquiry (*Human Rights Code*)
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APPEARANCES

Ontario Human Rights Commission	)	Ena Chadha, Counsel
James Moffatt	)	William S. Challis, Counsel
James Moffatt	)	On his own behalf
Harry Oswin	)	Brian D. Mulroney, Counsel
Kinark Child & Family Services	)	Lucy Siracco
	)	Jane Dawes

FACTUAL BACKGROUND

1. On July 4, 1995, this complaint was referred by the Human Rights Commission ("the Commission") to the Board of Inquiry ("BOI"). On July 19, 1995, Gerry McNeilly, the Chair of the BOI made the following appointment in this case:

> Pursuant to the referral of the above complaint to the board of inquiry under s.35(6) of the *Human Rights Code* by the Ontario Human Rights Commission and the receipt of same by the Tribunals' Office on July 4, 1995, I hereby appoint Katherine Laird as a panel to hear and decide the complaint.

2. Pursuant to s. 39(1) of the *Human Rights Code*, R.S.O. 1990, c.H-19, as amended ("the *Code*") , a hearing into the complaint was required to commence within thirty days of the referral. In order to comply with this statutory time constraint, BOI hearings customarily commence by conference call. Ms. Laird presided over the commencement of this hearing by conference call on August 1, 1995. A subsequent conference call was convened on August 24, 1995. Memoranda dated August 4, 1995 and September 6, 1995 were sent to the parties by the Deputy Registrar of the BOI. The stated subject of these memoranda is "Notice of confirmation of matters determined at first day of hearing via conference call" and "Notice of confirmation of matters determined at second day of hearing via conference call". As set out in the memoranda, the matters so determined were the following:

- at the first conference call, the date for its resumption
- deadlines for the filing of material with the parties and the BOI
- the date for mediation
- the date for the first day of oral hearing with all parties present before the panel
- continuation dates for the hearing

In addition, I understand from the parties' oral submissions made to me on November 2, 1995, that they canvassed with Ms. Laird a number preliminary motions they were considering. I understand that no motions were actually brought at the conference calls, nor was any evidence heard by Ms. Laird.

3. On October 18, 1995, the Chair of the BOI made the following appointment in this case:

> By Notice of Appointment dated July 19, 1995, I appointed Katherine Laird as the panel of the Board of Inquiry. As Katherine Laird is unable to continue to hear this matter, I assign Mary Anne McKellar as the panel to hear and determine the complaint. I make this reassignment pursuant to my authority under s. 35(8) of the *Human Rights Code*.

4. The parties were not notified that the case had been reassigned to me. When the oral hearing convened on November 2, 1995, I introduced myself to the parties and explained that the matter had been reassigned to me for the purpose of equalizing the workload among the BOI vice-chairs, and ensuring that hearings commence and finish in a timely fashion and decisions are rendered shortly thereafter. In this particular instance, I pointed out that I had convened conference calls on a number of complaints that settled prior to the first day of oral hearing, while Ms. Laird, allocated a similar number of files at the outset, was in the position of seeing many of them proceed to a multiple-day hearing. In addition, I explained that there were workload considerations stemming from the fact that the full-time BOI vice-chairs are cross-appointed to the Pay Equity Hearings Tribunal and may be involved in lengthy hearings under that legislation.

5. Both Counsel for the Complainant and Counsel for the Commission expressed some concern that they had not been notified in advance of the reassignment, and queried whether the reassignment was properly made such that I had jurisdiction to proceed and hear the

matter or whether Ms. Laird was seized of the case. After a short recess so that they might review the provisions of the *Code*, and determine whether they wished to bring any motions with respect to these matters, Mr. Challis, Counsel for the Complainant, advised that he wished to make a motion that I was without jurisdiction to hear this matter, and that Ms. Laird must continue to do so. Counsel for the Commission, Ms. Chadha, was unable to obtain instructions with respect to whether she wished to bring a motion, or what position she would be taking with respect to Mr. Challis' motion. Counsel for the Respondent, Mr. Mulroney, advised that he would be opposing Mr. Challis' motion.

6. Mr. Challis requested an adjournment in order to prepare his motion. The parties all agreed that this motion could be dealt with by written submissions pursuant to the following timetable:

- Mr. Challis' submissions on jurisdiction to be served on the other parties and filed with the BOI by November 16, 1995.

- Mr. Mulroney's submissions in response to be served on the other parties and filed with the BOI by November 27, 1995.

- Ms. Chadha to advise the other parties and the BOI as soon as possible if she would be taking a position on the motion or bringing one of her own, and if she would be taking a position to observe whichever of the above deadlines was applicable.

- Mr. Challis to serve and file any reply submissions by December 4, 1995.

7. By letter dated November 6, 1995, Commission Counsel advised that she would be taking no position "on the issue of Ms. McKellar's jurisdiction to preside as the panel".

8. By letter dated November 6, 1995, Mr. Challis wrote to the Chair of the BOI characterizing my explanation of the reasons for the reassignment as follows:

> . . . Ms. McKellar advised that it is not uncommon for the Board of Inquiry to have "conference call" hearings under section 39(1) conducted by the original appointee, and to substitute another Board member to hear and decide the Complaint on its merits. As I understood Ms. McKellar, substitution in this case resulted because of the Board of Inquiry's scheduling convenience and Board members' case loads.

He further sought to know:

> . . . the facts and reasons which were the foundation for your determination that Ms. Laird "is unable to exercise [her] powers under section 39 or 41" of the Code.

The Chair wrote back, advising Mr. Challis that

> . . . my decision to reassign the above-captioned complaint to Ms. McKellar for hearing and determination was made for the reasons given by Ms. McKellar at the hearing on November 2, 1995.

9. In his submissions dated November 16, 1995, Mr. Challis requested that, in addition to the written submissions from the parties, I permit them to make oral submissions on the motion with respect to jurisdiction. He further advised that Commission Counsel agreed with this manner of proceeding. Mr. Mulroney, in his submissions of November 27, 1995, opposed the request for an oral hearing on the motion. Mr. Challis' reply submissions were received by the BOI on December, 5, 1995.

10. In addition to the documents referred to in Paragraphs 8 and 9 above, Mr. Challis also corresponded with the Chair of the BOI on a number of other occasions. Pursuant to the direction contained in the Reply submissions, I have been provided with copies of letters dated November 21, 22, and 27, 1995. Apparently Mr. Challis was contacted by a BOI

staff solicitor subsequent to filing his submissions of November 16, 1995, and questioned about their contents and the purpose of this motion. He wrote to the Chair, questioning the propriety of this conduct, which he was advised had been prompted by the Chair's "institutional interest" in the jurisdictional issue. Mr. Challis then grew concerned that my adjudicative independence might be compromised in some way by the presence of this institutional interest. I can assure Mr. Challis that I was completely unaware of this correspondence and the issues canvassed in it until it was placed before me pursuant to his direction. I can also assure him that I have had no discussions with the solicitor or the Chair either before or since seeing this correspondence relating to this so-called institutional interest. In rendering this decision, I have had regard only to the submissions of the parties. His concern that he be made aware of any legal advice I might seek or receive from the solicitor in the future should be alleviated by a review of the provisions of s. 39 (6) of the *Code*.

ISSUES AND DETERMINATIONS

11. In my view, there are four issues before me:

- Should I entertain oral submissions on the jurisdictional motion? I determine that I will not entertain oral submissions.

- Is there any delay incumbent upon this reassignment? I determine that there is not.

- Does the Chair of the BOI have the authority to reassign panels in these circumstances? I determine that he does.

- Were the parties entitled to notice of the reassignment? I determine that they were not legally entitled to such notice.

REASONS

Request for oral hearing on the motion

12. The hearing cannot proceed until the issue of my jurisdiction to hear it has been determined. The hearing is scheduled to resume December 11 - 15, 1995. At the hearing on November 2, 1995, all of the parties agreed that this motion could be dealt with by way of written submissions. I was of the view that a dramatically more truncated timetable for submissions than that outlined in Paragraph 7 above should be observed in order to ensure that I could prepare my decision and reasons and communicate them to the parties in advance of December 11, 1995. It was largely at the insistence of Mr. Challis, who wanted two weeks in which to prepare his submissions, that the final timetable was adopted. Now Mr. Challis proposes that

> . . . the next date scheduled for hearing this matter, December 11, 1995, be devoted to addressing in oral argument the jurisdictional issues herein raised, and that Ms. McKellar make her decision on jurisdiction as soon as possible thereafter. The remaining dates that week could be devoted, if necessary, to dealing with the outstanding motions of the parties on cross-examination and amending the complaint, without reaching the evidence.

13. I indicated to the parties on November 2, 1995 that I was not willing to commit myself to making an oral ruling on a jurisdictional issue. That reluctance, as well as a desire not to waste the scheduled hearing dates, formed the rationale for seeking written submissions. I fail to see how it will be possible to hear oral argument on this motion on December 11, 1995 and prepare and deliver complete written reasons based on that argument and the written submissions received to date in a timely enough fashion that we may make use of the other hearing dates scheduled for that week. Until I have decided whether I have jurisdiction to hear this matter, it makes no sense for me to entertain motions with respect to cross-examination of affiants; amending the complaint; the process

for arguing those motions; or the requirements for notice of constitutional question, all of which are preliminary matters to be dealt with in this file. This file originates with a complaint filed in 1991 and referred to the BOI on July 4, 1995. It will soon be 1996. The matter should be proceeded with as expeditiously as possible. Furthermore, my review of the parties' submissions satisfies me that they form an adequate basis for my disposition of this motion.

14. Accordingly, I decline to grant this request for three reasons. First, the parties agreed to proceed by written submissions and their own estimates of the time required to prepare those submissions was accepted. Second, it would occasion unnecessary delay in the resolution of these already protracted proceedings. On this point, specifically, I take account of Mr. Mulroney's opposition to the request. Third, the written submissions I have received provide an adequate basis on which to dispose of the motion.

15. Given that the Commission is taking no position and making no submissions on the merits of the motion, I fail to see why it has any interest whatsoever in whether I entertain oral as well as written argument. Its support for Mr. Challis' request does nothing to persuade me that an oral hearing is required or advisable in these circumstances.

WILL THE REASSIGNMENT ENGENDER DELAY IN THE DISPOSITION OF THESE PROCEEDINGS?

16. Both the Complainant's and the Respondent's Counsel agree on one thing: administrative tribunals in general and the BOI in particular have as one of their chief purposes the expeditious resolution of the proceedings before them. *Re Roosma and Ford Motor Co. Of Canada* (1988), 66 O.R. (2d) 18 (Div. Ct.) was cited by both Mr. Challis and Mr. Mulroney as supporting this proposition, which is one with which I wholeheartedly agree and which forms the starting point for my analysis.

17. In the two conference calls she convened on this case, Katherine Laird heard no evidence. The only determinations or rulings she made were with respect to what I call "administrative" or "case management" matters -- deadlines for filing materials and the scheduling of mediation and hearing dates. None of those matters need to be revisited before me. I am available to sit on all of the days scheduled by Ms. Laird. The reassignment of the case to me will not delay the timely adjudication of it. The only unanticipated delay attributable in any way to the reassignment involves the dedication of the November 2, 1995 hearing day to dealing with the question of the reassignment rather than the motions originally intended to be heard that day. In his Reply submissions, Mr. Challis remarks that I was unfamiliar with some of the contents of the file and extrapolates the point that reassignments of this nature will necessarily engender delay while the new adjudicator gets up to speed on the file. As I did at the time, I want to assure Mr. Challis and the other parties that I had read and was familiar with all of the file material provided to me. Unfortunately, however, that material was incomplete in failing to include a copy of recent correspondence from the Commission. I apologized at the time for not being familiar with this material, and I do so again now. This problem was not occasioned by the reassignment of the case, and in any event, no delay was caused by it, as the matters canvassed in the correspondence pertained to a motion that was not considered on November 2, 1995.

18. To the extent that anticipated delay consequent upon the reassignment constitutes a ground for this motion, it is unfounded upon the facts.

JURISDICTION TO REASSIGN IN THESE CIRCUMSTANCES

19. It is necessary to start with a bit of history here. Prior to April 17, 1995, upon the request of the Commission, human rights complaints were referred for hearing to specific persons appointed by the Minister of Citizenship on an *ad hoc* basis from a list of potential adjudicators. The person or persons so appointed in respect of a particular complaint

became a board of inquiry. On April 17, 1995, however, Bill 175, a statutory amendment to the *Statutory Powers Procedure Act*, constituted a tribunal, known as the Board of Inquiry to hear complaints upon referral. The BOI is composed of full and part-time adjudicators, known as vice-chairs, appointed for a specific term (for example, three years) by the Lieutenant Governor in Council. Complaints referred to the BOI are assigned by the Chair for hearing to one or more vice-chairs. In other words, the BOI now has an identity separate from that of the individuals comprising the panel that hears a particular case.

20. Section 35 of the *Code* provides:

> 35 (1) There shall be a board of inquiry for the purposes of this Act composed of such members as are appointed by the Lieutenant Governor in Council.
>
> (2) The members of the board of inquiry shall be paid such allowances and expenses as are fixed by the Lieutenant Governor in Council.
>
> (3) The Lieutenant Governor in Council shall appoint a chair and may appoint one or more vice-chairs of the board of inquiry from among the members of the board of inquiry.
>
> (4) Such employees as are considered necessary for the proper conduct of the board of inquiry may be appointed under the Public Service Act.
>
> (5) The board of inquiry may make rules regulating its practice and procedure and generally for the conduct and management of its affairs and such rules are not regulations within the meaning of the Regulations Act.
>
> (6) The chair of the board of inquiry may appoint panels composed of one or more members of the board to hold hearings in the place of the full board wherever the board of inquiry is required to hold a hearing under this Act and, where a panel holds a hearing, the panel has all the powers and duties, except the power in subsection (5), given to the board of inquiry under this Act.
>
> (7) The chair of the board shall designate one member of each panel to preside over the panel's hearings.
>
> (8) Where a panel of the board is unable for any reason to exercise the powers under section 39 or 41, the chair of the board of inquiry may assign another panel

in its place.

21. Neither the Chair's authority to make the original assignment of this case to Katherine Laird for hearing, nor the validity or *bona fides* of that choice of vice-chair has been questioned. What is in question here is the Chair's reassignment of the case to me. The crux of the dispute is the interpretation to be given to s. 35(8) of the *Code*, and in particular the phrase "unable for any reason to exercise the powers".

22. Mr. Challis submits that the Chair was statutorily proscribed from reassigning the case because Ms. Laird is not suffering from a physical, mental or legal inability to complete the hearing. He further submits that there is good reason for this statutory restriction on reassignment: it prevents the Chair from "panel shopping" for an adjudicator who will render a decision that is in accordance with the Chair's own views on an issue.

23. Mr. Mulroney submits that s. 35(8) must be read in the context of *Bill 175* as a whole, which had for its purpose, as stated in the preamble, the improvement of service to the public. In this context, he submits, s. 35(8) ought to be read more broadly than Mr. Challis suggests, to allow for hearings to be conducted more expeditiously by substituting panels of Board where necessary. He argues that restricting the Chair's ability to substitute one panel for another invites a challenge and potential inquiry into the *bona fides* whenever such substitution occurs.

24. Both parties provided me with authorities in support of their submissions on the meaning of "unable for any other reason". None of these cases dealt with the term "unable" in the context of an adjudicator's fulfilment of a statutory duty. I have found it more illuminating to consider the "incapacity" provisions in the statutes governing other quasi-judicial tribunals. To my knowledge, there are two in Ontario: the *Pay Equity Act*, R.S.O. 1990, c.P-7 and the *Labour Relations Act, 1995* ("*Bill 7*"). Both of these statutes deal with tri-partite tribunals, a fact which must be kept in mind when reviewing the various

"substitution" models available under them. Section 29.1 of the *Pay Equity Act* provides, in part:

> 29.1 (1) If, after a panel of the Hearings Tribunal begins holding a hearing respecting a matter but before it reaches a decision on all the issues before it, the presiding officer dies or becomes incapacitated, another panel of the Tribunal shall decide whether,
>
> (a) the hearing should continue but with the member who died or became incapacitated having been replaced by a presiding officer or deputy presiding officer; or
>
> (b) a new hearing should be held before another panel.
>
> (2) [deals with how to proceed in the event of the death or incapacity of a panel member representative of employers or employees]
>
> (4) A panel that decides that there should be a new hearing under clause (1)(b) or (2)(d) may, if the previous panel had reached a decision respecting some of the issues before it, direct that any decision respecting those issues stands and that the new panel should consider only the issues that remain outstanding.

Section 109 (12) of *Bill 7* reproduces s. 104(11.1) of its predecessor and provides:

> . . . if a member representative of either employers or employees dies or is unable to continue to hear and determine an application, request, complaint, matter or thing, the chair or vice-chair, as the case may be, who was also hearing it may sit alone to determine it and may exercise all of the jurisdiction and powers of the Board when doing so.

25. One can easily think of a whole range of situations in which the chair of a tribunal might have legitimate reasons for wishing to reassign cases from one adjudicator to another. The metaphor of a continuum might be used to describe these situations, which could range from, at the one extreme, a situation where it was impossible for the adjudicator to continue, to, at the other extreme, a situation where it was merely undesirable for the adjudicator to continue. Examples of impossibility would include death, or, as Mr. Challis suggested, removal of an adjudicator for bias. Examples of undesirability

might include such things as a realization that a case just commenced would require so many hearing days that it could not possibly conclude prior to the commencement of a previously-arranged or anticipated leave of some significant duration (for example, a year-long pregnancy leave), or prior to the expiration of the member's Order-In-Council appointment, which the Chair has been advised will not be renewed. The language of the *Pay Equity Act* and *Bill 7*, with their emphasis on death and incapacity or inability, appear to restrict the availability of substitute panels to those situations that fall closer to the "impossibility of continuation" end of the continuum. By contrast, the language in s. 35(8), "unable for any reason", is much less restrictive, and in my view encompasses the authority to substitute panels in situations that fall closer to the "undesirability of continuation" end of the continuum. I must ascribe some meaning or intention to the deliberate choice of "for any reason" in s. 35(8), particularly in view of the fact that the *Pay Equity Act* and *Bill 7* provisions already existed at the time this section was drafted.

26. In my view, the language "unable to continue for any reason" in s. 35(8) is broad enough to authorize the BOI Chair to reassign this case from Katherine Laird to me in a situation where he felt that the scheduling and workload demands of the BOI required it. Mr. Challis' concern that this authority could potentially be exercised in a cavalier manner, or for improper purposes, such as manipulating the outcome of cases, is a valid concern. It is not, however, one that is necessarily confined to the reassignment of cases, but could arise in respect of the initial assignment, and there is no doubt that the Chair has the authority under the statute to make those initial assignments. Fear of potential abuse of authority is no reason to circumscribe the ambit of that authority. The more appropriate response is to challenge the Chair in his exercise of the discretion to reassign if there is any reason to believe, which there is not on the facts of this case, that that discretion has been exercised and the reassignment effected for improper purposes.

27. I want to comment briefly on the *Abouchar* case. The relevant facts are the

following. It involves a human rights complaint in which an *ad hoc* board of inquiry composed of Michel Picher was appointed prior to the *Bill 175* provisions taking effect on April 17, 1995. Subsequent to April 17, 1995, Mr. Picher advised the Chair of the BOI that his limited availability for the number of hearing days required to complete the case meant that its completion might be delayed for up to two years or more. Pursuant to the new s. 35 of the *Code*, the Chair of the BOI appointed a full-time Order-In-Council appointee to hear the case in Mr. Picher's stead. The issue was whether a case originally assigned under the pre-*Bill 175* regime could subsequently be assigned pursuant to the provisions of *Bill 175*. The new panel held that the Chair had not exceeded jurisdiction in making the reassignment. This determination is now the subject matter of a judicial review application. *Abouchar* raises jurisdictional issues that relate specifically to the transitional period between the two statutory regimes. It has no application to the motion before me.

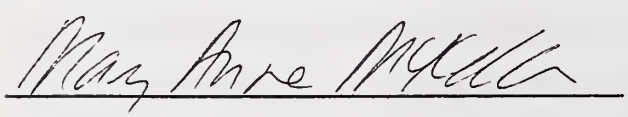
REQUIREMENT FOR NOTICE OF REASSIGNMENT

28. The issue of whether the parties ought to have received notice of the reassignment of the case to me was raised by Counsel for both the Commission and the Complainant at the hearing on November 2, 1995, and then referred to again more obliquely by Mr. Challis in his written submissions. The principles of administrative law generally require that persons be provided notice of events that potentially affect their interests. Consequently, a requirement to notify parties of the reassignment of a hearing to another adjudicator could only be predicated on their having a legal interest in the adjudication of their case by a particular vice-chair. There is no such interest. I am deeply troubled by Commission Counsel's suggesting at the hearing on November 2, 1995, that she was in some way prejudiced in her presentation of the case by the reassignment because she had prepared her arguments with a particular adjudicator in mind. All of the BOI vice-chairs are expected to and do act professionally, responsibly, fairly, and impartially in the fulfilment of their adjudicative functions and determine the complaints before them based on the evidence adduced and the submissions made at the hearing.

ORDER

29. This hearing will resume before me on December 11, 1995. At the last day of hearing it became apparent that there would be a number of preliminary matters to be dealt with on December 11, 1995. If anything, their number seems to have increased rather than decreased in the interim. For example, on the matter of the cross-examination of affiants, I believed that the parties were attempting to sort this out among themselves without the need of a motion, but the submissions filed on behalf of the Complainant now lead me to conclude that these attempts have not met with success, and a ruling from me may be required. I also note that correspondence from Mr. Challis to Mr. Mulroney since the last day of hearing indicates that the potential exists for a motion with respect to the issue of disclosure. I am directing each party to provide to the other parties and to the BOI Registrar by 5:00 p.m. Friday, December 8, 1995, a list of its intended preliminary motions. The first part of the hearing on Monday will be devoted to sorting out which of those motions will actually proceed; the order in which they should be heard; and any other "process" issues associated with them. The parties should be prepared to proceed on any or all of their intended motions on that date.

DATED AT TORONTO, ONTARIO, THIS 6TH DAY OF DECEMBER, 1995



Mary Anne McKellar, Vice-Chair